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Supreme Court of the United States

October Term, 1975
No. 74-1563

THE CITY OF EASTLAKE, *et al.*,
Petitioners,

vs.

FOREST CITY ENTERPRISES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF AMICI CURIAE, CITIES OF GARFIELD HEIGHTS, HIGHLAND HEIGHTS, MIDDLEBURG HEIGHTS, OLMSTED FALLS, PARMA, AND SEVEN HILLS

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TABLE OF CONTENTS

Table of Authorities I
Interest of *Amici Curiae* 1
Argument 2
The Decision of the Ohio Supreme Court Denies the Cherished Right to Vote 2
Historically, Referendum Requirement Responded to Abuse of Representative Government 3
Referendum Is Essential to Maintenance of People's Power 6
Mandatory Referendum Insures Responsible and Responsive Operation of Local Government 8
Court Incompetent to Inquire Into Motive of Voters 10
"Consent" Cases Inapplicable 13
Conclusion 16

TABLE OF AUTHORITIES

Cases

Allen v. Scott (1922), 104 Ohio St. 436 7
Avery v. Midland County, Texas, 390 U.S. 474 (1968) .. 8
Berman v. Parker, 348 U.S. 26 (1954) 11
Carrington v. Rash, 380 U.S. 89 (1965) 12
Cincinnati, Wilmington and Zanesville Railroad Company v. The Commissioners of Clinton County (1852), 1 Ohio St. 77 6
City of Youngstown v. Craver (1933), 127 Ohio St. 195 8
Currin v. Wallace, 306 U.S. 1 (1939) 14

Driscoll v. Austintown Associates (1975), 42 Ohio St. 2d 263 15
Eubank v. City of Richmond, 226 U.S. 137 (1912) 13, 14
Ferguson v. Skrupa, 372 U.S. 726 (1963) 6
Harman v. Forssenius, 380 U.S. 528 (1965) 2
James v. Valtierra, 402 U.S. 137 (1971) 3
Johnston v. City of Claremont, 49 Cal. 2d 826, 323 P.2d 71 (1958) 8
Labine v. Vincent, 401 U.S. 532 (1971) 12
Louisiana v. United States, 380 U.S. 145 (1965) 2
McCray v. United States, 195 U.S. 27 (1904) 11
Old Dearborn Distributing Co. v. Seagram Distillers Corp., 299 U.S. 183 (1936) 14
Partain v. Brooklyn (1956), 101 Ohio App. 279 8
Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), *cert. denied* 397 U.S. 980 (1970), *rehearing denied* 397 U.S. 1059 (1970) 11
Reynolds v. Sims, 377 U.S. 533 (1964) 3
Schneider v. State, 308 U.S. 147 (1939) 13
Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (9th Cir. 1970) 15
State, ex rel. City of Middletown v. City Commission of City of Middletown (1942), 140 Ohio St. 368 7
State, ex rel. Fostoria v. King (1950), 154 Ohio St. 213 8
Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917) 13, 14
United States v. O'Brien, 391 U.S. 367 (1968) 11
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 12
Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926) 10

Washington, ex rel. Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928) 13, 14
Wesberry v. Sanders, 376 U.S. 1 (1964) 3

Constitutional Provisions and Statutes

Ohio Constitution:

Article I, §2 6
Article II, §1 f 6
Article II, §30 14
Article XVIII, §3 7
Article XVIII, §8 15

Ohio Revised Code:

Section 133.16 15
Section 133.17 15
Section 139.02 15
Section 303.11 15
Section 306.32 15
Section 306.49 15
Section 519.11 15
Section 718.01 15
Section 731.29 9
Section 731.30 8
Section 1515.04 15
Section 5705.19 15

United States Constitution, Fourteenth Amendment 3, 13

Other Sources

Rule 42 (4), Rules of the Supreme Court of the United States 1
I Proceedings and Debates of the Constitutional Convention of the State of Ohio (1912) 664, 736 5

Robert Crosser, *The Initiative and Referendum Amendments in the Proposed Ohio Constitution*, 43 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 191 (1912) 5

George W. Guthrie, *The Initiative, Referendum and Recall*, 43 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 17 (1912) 4, 6

Lewis Jerome Johnson, *The Initiative and Referendum —An Effective Ally of Representative Government*, 40 NEW ENGLAND MAGAZINE 405 (1909) 4

BERNARD SMITH, THE DEMOCRATIC SPIRIT, at XXV-XXVI (New York: Alfred A. Knopf, 1941) 13

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INTEREST OF AMICI CURIAE

This *amici curiae* brief is filed, pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States, by the cities of Garfield Heights, Highland Heights, Middleburg Heights, Parma, and Seven Hills, which are political subdivisions of the State of Ohio, and it is sponsored by the authorized law officer of each of these municipalities, as listed on the inside of the front cover.[1]

1. At the time this brief was being written, there were several other communities in the process of passing legislation authorizing sponsorship, but the legislative process had not been completed by the printer's deadline and so they could not be listed.

Each of the *amici curiae* is vitally interested in this litigation because each of them adopted, by vote of the people, a charter provision or ordinance similar to the charter provision of the petitioner, the City of Eastlake, which reserves to the people the right to approve or reject proposed zoning changes. The City of Parma has an additional vital interest. It has been sued by a builder who purchased a parcel of property which is zoned for single-family residences and wants the property rezoned for an office building. His motion for a summary judgment based on the decision below was denied by the Court of Common Pleas, and that suit is pending. The decision of this Court in the case at bar will determine whether or not Parma's mandatory-referendum ordinance will be sustained.

Amici Curiae regard the referendum requirement in a positive light. It represents the expressed desire of Americans to engage in popular democracy. It makes effective the concept that government in this land is truly of, by, and for the people who desire to participate in the making and unmaking of the laws which affect the very quality of their lives.

ARGUMENT

The Decision of the Ohio Supreme Court Denies the Cherished Right to Vote

This is a voting-rights case. As unanimously held in *Louisiana v. United States*, 380 U.S. 145, 153 (1965), it is the "cherished right of people in a country like ours to vote." The right to vote is of the essence of a democratic society and that right is fundamental because it is preservative of all rights. *Harman v. Forssenius*, 380 U.S. 528, 537

(1965). Other rights, even the most basic, are illusory if the right to vote is undermined. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Undeniably, the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections. A consistent line of decisions by this Court in cases involving the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally-protected right to vote, and history has seen a continuing expansion of the scope of the right of suffrage in this country. *Reynolds v. Sims*, 377 U.S. 533, 554-555 (1964).

Provisions for mandatory referendums on zoning matters demonstrate devotion to democracy. This procedure ensures that all the people of a community will have a voice in democratic decisionmaking that will affect the future development of their own community. *James v. Valtierra*, 402 U.S. 137, 141 (1971).

By overturning the mandatory-referendum provision of the City of Eastlake's Charter, the Supreme Court of Ohio denied the people's cherished, constitutionally-protected right to vote. Despite the fact that rights guaranteed by the federal Constitution, such as the right to vote, are protected against deprivation by the states through operation of the Due Process Clause of the Fourteenth Amendment, the Court below based its erroneous decision on that very clause.

Historically, Referendum Requirement Responded to Abuse of Representative Government

In the latter part of the Nineteenth Century, there was popular discontent with abuses committed by state legislatures which succumbed to the pressures of political

bosses and corporate magnates and passed legislation for the benefit of a variety of franchise hunters, building contractors, and other special interest groups.[2] In reaction, two popular movements arose to restore government to the people: municipal home rule and initiative and referendum. During the Progressive Era in the first part of this century, a number of states adopted these measures. By popular vote they were incorporated into the Constitution of Ohio in 1912.

On March 12, 1912, William Jennings Bryan addressed the Constitutional Convention of Ohio and urged adoption of the initiative and referendum provisions for submission to the people:

> The initiative and referendum do not overthrow representative government—they have not come to destroy but to fulfill. The purpose of representative government is to represent, and that purpose fails when representatives mis-represent their constituents. Experience has shown that the defects of our government are not in the people themselves, but in those who, acting as representatives of the people, embezzle power and turn to their own advantage the authority given them for the advancement of the public welfare. It has cost centuries to secure popular government; the blood of millions of the best and the bravest has been poured out to establish the doctrine that governments derive their just powers from the consent of the governed.
>
> All this struggle, all this sacrifice, has been in vain if, when we secure a representative government,

2. Lewis Jerome Johnson, *The Initiative and Referendum—An Effective Ally Representative Government*, 40 NEW ENGLAND MAGAZINE 405 (1909); George W. Guthrie, *The Initiative, Referendum and Recall*, 43 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 17 (1912).

> the people's representatives can betray them with impunity and mock their constituents while they draw salaries from the public treasury.[3]

During the debate on the proposal, delegate Fackler noted how the opponents were "always sparring in order that they might not be placed in a position of not having faith in popular government, but in fact trying to find some other ground on which they can hang an objection to the measure." He responded to one of the charges of the opponents, that the right to referendum would bring about the destruction of representative government, by showing it was unsound to argue that the placing of the check and balance of the initiative and referendum upon representative government would be destructive of it. "You do not destroy the power of an agent when you reserve a right to veto his action, or when you keep the right to go in and do what he has failed to do."[4]

Thus, the majority of the Supreme Court of Ohio made its erroneous decision because it failed to comprehend that there is no "unlawful delegation of legislative power" when the people vote in a referendum election, for they have expressly reserved to themselves that right in the State's fundamental law—the Constitution of Ohio. A municipal charter provision or ordinance reserving to the people of a community the right to a referendum on any legislation deemed necessary gives expression to the right of self-government; that is, a government of the people, functioning for the people (rather than for special interests)

3. Vol. I Proceedings and Debates of the Constitutional Convention of the State of Ohio 664 (1912); see also the article by Robert Crosser, Chairman of the Committee on the Initiative and Referendum, in 43 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 191 (1912) entitled *The Initiative and Referendum Amendments in the Proposed Ohio Constitution.*

4. Proceedings and Debates at 736.

precisely because it is government by the people. As stated by one of the ardent advocates of referendums, George W. Guthrie, a former Mayor of Pittsburgh:

> There can be no order and stability in any community, no civilization worthy of the name, unless the law gives expression to the ideals and collective will of the people, and its administration commands their respect.[5]

Referendum Is Essential to Maintenance of People's Power

Article I, § 2 of the Constitution of the State of Ohio declares that "All political power is inherent in the people", and Article II, § 1 f provides that "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action . . ."

In fashioning its denial to the people of their cherished right to vote in referendums on local zoning ordinances, the Supreme Court of Ohio resurrected the discredited concept of "substantive due process",[6] without mentioning it by name. The majority simply did not like the idea of the referendum requirement, but could find no State precedent for declaring it unconstitutional. The trial court, three Court of Appeals judges, and two dissenting Supreme Court judges found no constitutional infirmity.

In *The Cincinnati, Wilmington and Zanesville Railroad Company v. The Commissioners of Clinton County* (1852), 1 Ohio St. 77, 86, the Ohio Supreme Court recog-

5. Guthrie, *supra*, note 2.

6. *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

nized the right of the people to reassume all or any part of delegated legislative power. "The people have thus granted certain political powers, to be exercised for their benefit, until they see fit to resume them, and have retained others."

Seventy years later, the Court spoke in terms of agency with respect to delegated legislative power: "The people who delegated that power did not make an exclusive grant . . . the powers of the creature cannot under any circumstances rise above those of its creator, the sovereign people who gave it being. The power of an agent cannot be greater than that of the principal." *Allen v. Scott* (1922), 104 Ohio St. 436, 443.

A unanimous Court in *The State, ex rel. City of Middletown v. City Commission of City of Middletown* (1942), 140 Ohio St. 368, 375, held that "The provisions of the Constitution authorizing a referendum should be so construed as to permit rather than preclude the exercise of the right conferred. The object clearly sought to be attained should be promoted rather than prevented or obstructed."

At the same time the people of Ohio amended their Constitution to reserve for themselves the right of initiative and referendum, they also adopted Article XVIII, § 3 of the Constitution which provides that "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Hence, there is express constitutional authority for the people of Ohio communities to subject all municipal zoning regulations to a mandatory referendum prior to becoming effective.

Moreover, "It is the policy of our government, federal and state, to at all times enlarge the powers of the people in matters of local self-government, rather than restrict them." *City of Youngstown v. Craver* (1933), 127 Ohio St. 195, 201.

"The right of referendum with respect to zoning ordinances is essential for the rights of the electors of each city. A zoning ordinance can and does have a more direct and lasting effect upon property values and property owners within a city than almost any other type of ordinance." *Johnston v. City of Claremont,* 49 Cal. 2d 826, 837, 323 P.2d 71 (1958).

As urbanization increases, institutions of local government, which have always been a major aspect of our system, and their responsible and responsive operation "is today of increasing importance to the quality of life of more and more of our citizens". *Avery v. Midland County, Texas,* 390 U.S. 474, 481 (1968).

Mandatory Referendum Insures Responsible and Responsive Operation of Local Government

It is to insure the "responsible and responsive operation" of local government that the people have turned to the mandatory referendum requirement. In Ohio, ordinances which are passed with an "emergency clause"[7] are not subject to a referendum initiated by petition.[8] Thus, it is possible for the legislative authority to prevent an optional referendum on a zoning ordinance by the device of passing it as an "emergency ordinance". Timing the passage of the ordinance is another method of effectively defeating an optional referendum. For example, it would be practically impossible to prepare, circulate, and obtain the required number of signatures during the holiday season between Thanksgiving and New Years, or during the vacation month of August, especially if the rezoning has been passed "quietly" with little or no publicity so that an interested homeowners' group would learn of the passage too late to meet the stringent statutory time requirement.[9]

7. Section 731.30 of the Ohio Revised Code.

8. *State ex rel. Fostoria v. King* (1950), 154 Ohio St. 213; *Partain v. Brooklyn* (1956), 101 Ohio App. 279.

As the popular movement for initiative and referendum at the turn of this century was in part a response to the felt-need to return government to the people, from the control of political bosses and special interests, so too the passage of mandatory referendum requirements was in part engendered by a similar felt-need. Aggressive land speculators and promoters, generally nonresidents of the community, have obtained zoning changes profitable to them, but the long-term consequences are being borne by the people who are the permanent residents of the community, and who have made the largest investment of their lives in their homes. Homeowners' associations have proliferated as it became apparent there was a need for collective action to protect the homeowners' substantial investment of money, time, and energy in their homes. They perceived a threat to the quality of life they desired, from speculators and promoters, and while they accepted the concept (expressed in the slogan made popular by the governor) that "profit is not a dirty word in Ohio", they recognized that the profit should not be their loss or detrimental to their interests.

For example, it is not uncommon for people to purchase a home in a new residential development only to find a short time later that the view, which in part enticed

9. Section 731.29 of the Ohio Revised Code.

them to purchase the home, is now being obstructed by high-rise apartments on nearby land formerly also restricted for single-family homes but later rezoned for apartments. The apartments always seem to come in after the homes are built. They are not built first with the single-family development coming later.

As this Court so aptly phrased it in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 394-395 (1926), the coming of apartment houses has sometimes resulted in destroying the entire section for private home purposes. The apartments become mere parasites, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district, and bring other undesirable consequences, so that under these circumstances "apartment houses, which in a different environment would not only be unobjectionable but highly desirable, come very near to being nuisances."

Spot zoning changes have a way of engendering others, frequently for the same promoters and speculators. An inducement for the rezoning, often heard, is that the changed use will generate more real estate taxes for the community, and that has an appeal—until the knowledge becomes general that property-value reductions are soon granted to the promoters while homeowners' taxes keep rising. Many times, what has been actually built is a far cry from the artists' renderings submitted to municipal officials to induce the zoning changes.

Court Incompetent to Inquire Into Motive of Voters

It was not the single motive to exclude, or resistance to change, that has produced the mandatory referendum requirement—as is the myopic and cynical viewpoint, unsupported by the record, of the concurring opinion below.

There are sound and practical reasons for insuring that the people will have the final word on zoning, in partnership with their elected officials, to see that the promoters' promises are kept and deviations from the master plan are minimized and made only for good cause.

What we are dealing with here is the constitutional right to vote in referendum elections—the exercise of the people's reserved right to approve or disapprove local regulations. Thus, it was beyond the competence of the judges joining in the concurring opinion below, the majority of the Court, to probe the collective minds of the voters. As was succinctly and well-stated in *Ranjel v. City of Lansing*, 417 F.2d 321, 324 (6th Cir. 1969), *cert. denied* 397 U.S. 980, *rehearing denied* 397 U.S. 1059 (1970), "if the electors had a legal right to a referendum, their motive in exercising that right was immaterial." It is a familiar principle of constitutional law that this Court will not strike down otherwise constitutional legislation on the basis of an alleged illicit legislative motive. *United States v. O'Brien*, 391 U.S. 367 (1968).

"The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray v. United States*, 195 U.S. 27, 56 (1904).

"A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker* [348 U.S. 26]. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for

people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

When a community plans one area for industrial use, another for apartments, and so forth, it is a community-wide concern if apartments are allowed to intrude into the industrial zone, for a precedent is set for requests to allow other instrusions into the other areas. Homeowners are naturally concerned that they not jeopardize residential districts. There is nothing untoward or violative of anyone's due process rights to have the mass of people most affected by zoning changes share in the decisionmaking process with elected officials. Officials imbued with the democratic spirit and perceiving their agency relationship with their principals—the voters—lose no self-esteem in submitting to the final decision of the people.

Since "there is nothing in the vague generalities of the Equal Protection and Due Process Clauses which empowers the Court to nullify the deliberate choices of the elected representatives of the people",[10] the Due Process Clause does not empower the Supreme Court of Ohio to nullify the deliberate choices of the people themselves, in whom all political power is inherent.

It is obvious from reading the majority and concurring opinions below that the majority of the court misconceived the role of the people in the democratic process and lacked faith in the people's ability to make responsible decisions in matters of vital concern to them. They foreclosed the people's right to vote on zoning matters because of fear and distrust of the way they may vote.

But, in *Carrington v. Rash*, 380 U.S. 89, 94 (1965) this Court held that:

10. *Labine v. Vincent*, 401 U.S. 532, 539-40 (1971).

> 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. '(T)he exercise of rights so vital to the maintenance of democratic institutions,' *Schneider v. State*, 308 U.S. 147, 161, 60 S. Ct. 146, 151, 84 L.Ed. 155, cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.

If it is constitutionally impermissible to deny the vote to a sector of the population because of the way they may vote, the entire community should not be disenfranchised because five judges question the voters' sense of responsibility or motives. Neither the Due Process Clause of the Fourteenth Amendment nor any other provision of the Constitution justifies denial of the cherished right to vote on such a negative perception of participatory democracy.

"Democracy is a very simple principle, and those who speculate about its meaning are those who are not quite willing to accept it. The dictionary defines it as 'the rule of the people'. Not much more need be said about it."[11]

"Consent" Cases Inapplicable

In the dissenting opinion below, Judge Corrigan persuasively distinguished the "consent requirement" cases from this voting-rights litigation. Although each of the three cases discussed in the majority opinion can be further distinguished from this litigation on their facts, *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917) is more analogous to the case at bar than is either *Eubank v. City of Richmond*, 226 U.S. 137 (1912), or *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928), on which the majority opinion was predicated.

11. Introduction to BERNARD SMITH, THE DEMOCRATIC SPIRIT, at XXV-XXVI (New York: Alfred A. Knopf, 1941).

Both Forest City Enterprises and Thomas Cusack Co. acquired property subject to existing prohibitions and restrictions, and both wanted to build something not permitted. *Cusack* held that permitting neighboring lot owners to consent to the removal of a restriction was constitutionally permissible. "This is not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances." 242 U.S. at 531.

Thus, the "consent" cases distinguish between an ordinance permitting neighbors to remove a land-use restriction and an ordinance permitting neighbors to impose one. The question decided by the Eastlake referendum was whether to approve a rezoning ordinance which would have removed a restriction against the type of building Forest City wanted to construct. The holding of the Ohio Supreme Court that this constituted an unlawful delegation of legislative power is not tenable.

A similar contention, likewise predicated on *Eubank* and *Roberge*, was rejected in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U.S. 183, 194 (1936). Here, also, as in that case, the restriction was already imposed with the knowledge of Forest City, and the restriction "ran with the acquisition and conditioned it."

Conditioning or withholding operation of legislation unless there is a favorable vote in a referendum election is a condition frequently found in police regulations, and it is also found in Congressional enactments held to be constitutional by this Court; *See, e.g., Currin v. Wallace,* 306 U.S. 1, 15 (1939).

Nor is the Eastlake type of mandatory referendum unique in Ohio. Article II, §30 of the Constitution, requires that any proposal to alter county boundary lines

must be approved in a mandatory referendum election. Article XVIII, §8 prescribes such an election in order to set up a municipal charter commission, and another election to approve the charter it drafts. Mandatory referendums are required for such diverse purposes as adoption of zoning in counties and townships;[12] the issuance of bonds for bridge reconstruction;[13] emergency school repair;[14] participation in federal aid programs;[15] the creation of a regional transit authority;[16] authority to tax for support of such an authority;[17] raising the limit on a municipal income tax;[18] creation of a soil and water conservation district;[19] and approval of taxes in excess of the 10-mill limitation.[20]

Moreover, any land owner has ample remedies, both administrative and judicial, if it is claimed that a zoning classification as applied to a particular parcel of land is unreasonable, arbitrary, or confiscatory. *Driscoll v. Austintown Associates* (1975), 42 Ohio St. 263.

A referendum "is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest." *Southern Alameda Spanish Speaking Organization v. Union City,* 424 F.2d 291, 294 (9th Cir. 1970).

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12. Ohio Revised Code, §§ 303.11, 519.11.

13. *Ibid.*, § 133.16 (60% favorable vote required at a special election).

14. *Id.*, § 133.17.

15. *Id.*, § 139.02 (65% required).

16. *Id.*, § 306.32.

17. *Id.*, § 306.49.

18. *Id.*, § 718.01.

19. *Id.*, § 1515.04 (65% required).

20. *Id.*, § 5705.19 (55% required at a special election).

CONCLUSION

Among the most preferred constitutional rights is the cherished right to vote. It is of the essence of a democratic society and fundamental because preservative of all rights. A consistent line of decisions by this Court in cases involving the right of suffrage has made it indelibly clear that the Constitution of the United States protects the right of all qualified citizens to vote in local as well as state and federal elections.

Provisions for referendums resulted from the felt-need of the people to reserve to themselves a portion of the legislative power, while delegating the greater part to their representatives as agents of the people. Since zoning ordinances have a more direct and lasting effect upon property values and property owners than almost any other type of ordinance, reservation of the right of referendum with respect to zoning is essential to preserve and protect their rights. Thus, provisions for mandatory referendums on zoning matters demonstrate devotion to democracy and ensure that all the people of a community will have a voice in democratic decisionmaking that will affect the future development of their own community.

Such mandatory-referendum provisions can hardly be an "unlawful delegation of legislative power", as the Court below held, since all political power is inherent in the people who delegate such share as they desire to their representatives and reserve to themselves the portion they desire to retain. Moreover, it is the traditional right of the voters through the direct-legislation, mandatory-referendum procedure to approve or override the views of their elected representatives as to what serves the public interest. There is no violation of the Due Process Clause in this democratic decisionmaking process.

It is therefore respectfully submitted that the decision of the Supreme Court of Ohio was clearly erroneous and should be reversed.

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